



U.S. Department of Justice

*United States Attorney  
Eastern District of New York*

EJK:EMN  
F.#1998R01996

271 Cadman Plaza East  
Brooklyn, New York 11201

March 1, 2012

By Hand

To Be Filed Under Seal

The Honorable Brian M. Cogan  
United States District Judge  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

RECEIVED  
HON. Brian M. Cogan  
MAR 1 2012

Re: United States v. John Doe  
Criminal Docket No. 98-1101 (ILG)

Dear Judge Cogan:

The government respectfully writes with respect to the conference held on February 27, 2012 concerning defendant John Doe's application to hold non-party Richard Roe and his attorney Richard Lerner, Esq. in civil contempt for their disclosure of certain information to The New York Times. Specifically, as the Court directed, the government addresses the propriety of the proposed representation of Mr. Roe by Mr. Lerner, and vice versa, in connection with Doe's application.

As an initial matter, the Court has the discretion to disqualify Mr. Roe and Mr. Lerner from representing each other in this proceeding. Federal courts have the inherent authority to disqualify attorneys in pending litigation when necessary to "'preserve the integrity of the adversary process.'" Hempstead Video, Inc. v. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) (quoting Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)); see also Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990). The exercise of that discretion requires a balancing of a party's "right freely to choose his counsel" against "the need to maintain the highest standards of the profession." Hempstead Video, 409 F.3d at 132 (quoting Gov't of India v. Cook Indus., Inc., 569 F.2d 737, 739 (2d Cir. 1978)).

Moreover, in light of the Court's referral of a possible criminal contempt investigation of Messrs. Roe and Lerner to the United States Attorney's Office for the Eastern

District of New York, conflict of interest principles in the criminal context should inform the Court's assessment of whether a conflict exists with respect to Doe's civil contempt motion. In the criminal context, the Second Circuit has held that there is a per se conflict of interest where an attorney is implicated in a defendant's crimes. See United States v. Fulton, 5 F.3d 605, (2d Cir. 1993) ("The per se rule applies when an attorney is implicated in the crimes of his or her client since, in that event, the attorney cannot be free from fear that a vigorous defense should lead the prosecutor or the trial judge to discover evidence of the attorney's own wrongdoing.") (internal quotation marks and citation omitted); but see United States v. Williams, 372 F.3d 96, 105 (2d Cir. 2004) (noting that the issue of "whether the per se conflict rules are applicable where the defendant is aware of the facts underlying what would otherwise be a per se conflict" are "unresolved in this Circuit"). Were, arguendo, either Mr. Roe or Mr. Lerner, or both, to be later charged with criminal contempt, it seems highly unlikely that either of them could represent the other in such a proceeding.

Given the Court's referral of Messrs. Roe and Lerner's conduct for criminal prosecution, the government is concerned that the instant proceedings might become relevant to a future investigation. Whether or not Messrs. Roe and Lerner testify at a hearing in this civil matter or instead seek to invoke their privilege against self-incrimination, as Mr. Roe suggested they would at the last conference, their conduct in defending against the contempt motion may become relevant to a future investigation in myriad other ways. The government therefore believes it prudent to avoid having Messrs. Roe and Lerner continue defending against Doe's civil contempt motion together without the benefit of conflict-free counsel.

Accordingly, and given the unquestionably unusual nature of this case, the government respectfully suggests that the Court has the discretion to disqualify Mr. Roe and Mr. Lerner from representing each other in the proceedings relating to Doe's civil contempt motion. See Armstrong v. McAlpin, 625 F.2d 433, 445-46 (2d Cir. 1980) (en banc) (observing that, though "possible ethical conflicts surfacing during a litigation are generally better addressed by the 'comprehensive disciplinary machinery' of the state and federal bar," "there may be unusual situations were

